No. 14352

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment and Sentence in the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

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JURISDICTION

This is an appeal from a verdict and judgment of conviction upon an indictment charging appellant and his co-defendant, Patricia Lewis, alias Pat Lewis, whose true name is Mary Donna Songahid (R. 190), with conspiracy to violate Title 18, U.S.C. Section 2422, the persuasion section of White Slave Traffic Act. Both defendants were found guilty. The defendant, Songahid, a white woman, was put on probation and has not appealed; the appellant Blassingame was sentenced to four years (R. 170).

Judgment was entered February 15, 1954 (R. 8). Notice of Appeal was filed February 15, 1954 (R. 10). On February 26, 1954, the district judge entered an order extending the time for filing the transcript of the record until May 15, 1954 (R. 11). The reporter's transcript was received by the Clerk of this court May 10,

1954. Before the record was printed an additional designation of the record was filed to include the Instructions and Verdicts, and these are incorporated in the record. The printed record was received by appellant October 5, 1954.

STATUTES INVOLVED

The White Slave Traffic Act as last amended is set forth as Sections 2421 and 2422, Title 18, U.S.C., and reads as follows:

§ 2421. Transportation generally.

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of

Columbia or any Territory or Possession of the United States—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 65 Stat. 812, amended May 24, 1949, c. 139, Sec. 47, 63 Stat. 96.

Reviser's Note. Based on Title 18, U.S.C., 1940 Ed., Secs. 397, 398, 401, 404 (June 25, 1910, c. 395, Secs. 1, 2, 3, 5, 8, 36 Stat. 825-827).

Section consolidates sections 397, 398, 401, and 404 of Title 18, U.S.C., 1940 Ed.

§ 2422. Coercion or enticement of female:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both." (June 25, 1948, c. 645, 62 Stat. 812)

Reviser's Note: Based on Title 18, U.S.C. 1940 Ed., Sec. 399 (June 25, 1910, Ch. 395, Sec. 3, 36 Stat. 825)

THE INDICTMENT

The indictment in this case was returned in the Western District of Washington, Northern Division, and reads as follows:

"The Grand Jury charges:

COUNT I

"That on or about January 5, 1953*, at or near Portland, Oregon, Sam Blassingame and Patricia Lewis, alias Pat Lewis, did conspire and agree together, and with each other, to commit an offense against the United States, that is, to knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, cause the said Patricia Lewis, alias Pat Lewis, to go in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose on the part of Sam Blassingame and Patricia Lewis that the said Patricia Lewis should engage in the practice of prostitution and that said defendants did knowingly cause said Patricia Lewis to go and be carried as a passenger upon the line of a common carrier, to-wit, United Airlines, in the said interstate commerce.

"It was further a part of said conspiracy that the said Sam Blassingame should accompany the said Patricia Lewis across the state line from Oregon to Washington as a passenger upon the line of said common carrier to Seattle, Washington, and in order to effect the object of the said conspiracy, the said Sam Blassingame and Patricia Lewis did commit certain overt acts within the Northern Division of the Western District of Washington and within the jurisdiction of this court, to-wit:

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* There is error in the printed record. The correct date is January 5, 1953.

OVERT ACTS

"1. That said Sam Blassingame and Patricia Lewis bought airplane tickets at Portland, Oregon, via United Airlines, to Seattle, Washington, on January 5, 1953.

"2. That said Sam Blassingame and Patricia Lewis boarded United Airlines airplane, Flight No. 675, at Portland, Oregon, to Seattle, Washington, on January 5, 1953, at approximately 3:45 p.m.

"3. That said Sam Blassingame and Patricia Lewis arrived at Seattle-Tacoma Airport, located in King County, in the Northern Division of the Western District of Washington, on January 5, 1953, at approximately 4:45 p.m. on board the United Airlines airplane, Flight No. 675.

"4. That said Sam Blassingame and Patricia Lewis, after arriving in King County as heretofore alleged in the preceding paragraph of this Indictment, traveled by the same taxicab from said airport to an address near Jackson Street, Seattle, Washington, on January 5, 1953.

"5. That said Sam Blassingame on January 5, 1953, transported Patricia Lewis by private automobile from the address near Jackson Street, Seattle, Washington, to 3009½ E. Spruce, Seattle, Washington.

"All in violation of Sections 2422 and 371, Title 18, U.S.C." (R. 3-5)

STATEMENT

The appellant Blassingame is a colored man, married, with three children, living with his wife (R. 116). He has never been convicted of crime (R. 169). The co-defendant, Songahid, or Lewis, a white woman, is

a professional prostitute (R. 120). She is married and has a child living in Portland (R. 124-125).

The Trip to Portland

Both defendants lived in Seattle and were acquainted prior to and during the year 1952. On New Year's eve of that year the defendant Songahid went to Portland from Seattle by air (R. 140)., there to work as a prostitute (R. 114). She bought and paid for her own ticket (R. 120), and was not accompanied by appellant. She registered at the Chamberlain Hotel in Portland and stayed there two or three days, then went to stay with some friends in that city (R. 99).

The witness, Beulah Smith, a prostitute (R. 28-29), testified that she knew both defendants. They were in her house in Seattle sometime during the year 1952—she was unable to fix the time with greater certainty (R. 22, 26, 28)—and they told her they were going to Portland (R. 25). The witness wanted to go along but appellant told her there would be no colored people where they were going, and she couldn't go (R. 25).[1] Appellant did not say why he was going to Portland (R. 26).

The witness McCandless testified, over objection, that during the month of February, 1953, the defendant told her that she and appellant, Blassingame, had been in Portland (R. 83).

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[1] The co-defendant Songahid testified that she never knew the witness Smith prior to December 31, 1952 (R. 137-138). She testified she met Mrs. Smith the night she was released from jail, January 9, 1953 (R. 112-113).

The Return Trip from Portland to Seattle

The co-defendant, Songahid, returned from Portland to Seattle January 5, 1953. Appellant Blassingame accompanied her on this journey. The co-defendant explained this trip as follows: She was a narcotics addict, and as a stranger in Portland, she was unable to renew her supply. She wanted to get her clothes and and get some narcotics and return to Portland (R. 115). She did not go back to Portland because she was arrested within six hours of her arrival in Seattle, and knew she would have to wait there until the case was disposed of (R. 118).

On January 5, 1953, the co-defendant went to the airport in Portland. There she met the appellant, Blassingame; this was the first time she had seen him since her arrival in Portland (R. 100, 109), although she heard that he had been at her friend's house (R. 142).

Appellant and his co-defendant talked together at the airport and decided to purchase their tickets as husband and wife under the name of Mr. and Mrs. Sam Blassingame in order to make a saving under the family plan (R. 110). She gave him the money for her ticket and he bought both tickets (R. 100, 102, 110).[2]

Appellant bought his own ticket (R. 102).

Appellant and his co-defendant rode side by side to

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[2] The airplies agent, Caughey, testified that she bought the tickets (R. 56, 60), although he could not identify her (R. 59). Mrs. Songahid contradicted this (R. 144).

Seattle. They did not discuss her purpose in going back to Seattle, nor was prostitution mentioned (R. 117). Upon arrival they took a cab and were driven to the co-defendant's apartment at 3009½ E. Spruce Street in Seattle. Appellant did not get out of the cab (R. 116).[3] The co-defendant told appellant to tell his wife that she would come by and see her the next day and the two parted (R. 111). There was no talk of prostitution on the trip from the airport to her home (R. 111), nor at any other time (R. 117).

The Co-defendant's Arrest

The apartment where the co-defendant lived at 3009½ E. Spruce Street, Seattle, had been the scene of a previous arrest of the co-defendant (R. 117). On the night of her arrival, there was a police raid, and the co-defendant was arrested (R. 118), and charged with illegal possession of narcotics (R. 111) and prostitution (R. 117). This case was subsequently dismissed because of the illegality of the arrest and search (R. 112).

The raid took place four or five hours after the co-defendant got home. According to her, some fellows came up to her apartment and she saw no reason to turn them away (R. 150). One, a civilian, was a steady customer, and the other two, who were soldiers, were his friends (R. 151).

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[3] The FBI agent, Bush, testified that she told him that the cab took them to an address on Jackson Street, where appellant got his own car and drove the rest of the way (R. 100). This corresponds with the indictment. Mrs. Songahid testified that Mr. Bush was mistaken on this (R. 152).

The co-defendant was taken to the police station. While she was being booked, she was observed trying to get rid of some papers, and these were taken by the police (R. 36-37). They proved to be the ticket stubs for the airplane passage, and were introduced in evidence as Exhibits "1" and "2" (R. 38, 49).

Appellant was not present and did not visit the co-defendant while she was in custody. She was released on bail three days after her arrest, January 9 (R. 113).

The House on 22nd Avenue

On January 21, 1953,[4] appellant rented a dwelling house at 724 22nd Avenue South, Seattle. The witness, Patsy Ruth McCandless, was with him when he leased the place (R. 74), about three days later she moved into the house for the purpose of practicing prostitution (R. 71-77).

The witness, McCandless, solicited the co-defendant to live in the house and practice prostitution there (R. 113, 119). Mrs. Songahid testified that she did live there, but because she was ill she did not practice prostitution there (R. 114, 119, 149).

Others made use of the house for the same purpose (R. 119). The house operated about one month (R. 78).

SPECIFICATIONS OF ERROR TO BE URGED

1. The court erred in holding the indictment sufficient to charge a crime under Title 18, Section 2422,

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[4] This date is fixed by the testimony of Charles H. Winston (Reporter's Transcript, p. 106). The testimony of Mr. Winston was inadvertently omitted from the printed record.

U.S.C., objection being taken by counsel by motion for acquittal (R. 105, 157).

2. The court erred in holding the evidence sufficient to sustain a conviction under the indictment, objection being taken by counsel by motion for acquittal (R. 105, 157).

3. The court erred in admitting the ticket stubs, Exhibits "1" and "2" in evidence. Counsel for appellant objected to testimony relating to the exhibits on the ground that since appellant was not present, it was not binding on him (R. 36-37); and further objected when the exhibits were offered in evidence that they were incompetent, irrelevant and immaterial as to him, and that no connection was shown between the exhibits and appellant (R. 49).

4. The court erred in admitting hearsay testimony of the witness, McCandless, that appellant asked the witness about being his "old lady," (R. 65), which implied and involved working for him as a prostitute (R. 71). Counsel for appellant objected that the matter was immaterial, had no connection with the case, and would not tend to prove or disprove any issue in the case (R. 67); further on the ground that it tended to establish a separate and distinct crime, and was of a highly inflammable nature (R. 67); further by motion to strike the answer (R. 66).

5. The court erred in admitting testimony of the witness, McCandless, that the co-defendant told her in the absence of appellant that the appellant and co-defendant made a trip to Portland together. Counsel

for appellant objected that the testimony was hearsay (R. 79) as to him, and that the conversation took place after the co-defendant was arrested and the conspiracy, if any, had ended (R. 80).

6. The court erred in denying the motion to strike all the testimony of the witness, McCandless (R. 95, 157), on the ground that the events described by this witness took place on and after January 23, 1953, whereas the journey from Portland to Seattle was completed on January 5, 1953.

7. The court erred in permitting improper cross-examination of the co-defendant, Songahid, testifying as a witness for the defense. Counsel for appellant objected on the ground that only convictions of crime and not mere arrests could be shown to impeach the witness (R. 131).

8. The court erred in giving and refusing instructions as follows:

(a) In instructing the jury

> "There can be no conspiracy of any kind unless three elements are present. These are:
>
> "First, the act of conspiring together of two or more persons, in this case only two persons.
>
> "Second, to commit the particular offense charged in the Indictment. That is, the transportation in interstate commerce for purposes of prostitution of the defendant Lewis. * * * ." (R. 187);

because the statutes under which the defendants were indicted make the offense conspiracy to *persuade,* induce, entice or coerce a woman or girl to go, etc., and not *transportation,* etc.

(b) In giving improper instructions, damaging to appellant's case, as follows:

> "You must find both defendants guilty or not guilty in this case, because you cannot find one guilty and the other not guilty." (R. 191);

because the evidence might have shown the co-defendant guilty and yet not be sufficient to establish the guilt of appellant.

Appellant's counsel took no exceptions to the instructions, but asks the court to notice them under Rule 52(b), Rules of Criminal Procedure.

9. The court erred in denying the motion for acquittal.

10. The court erred in denying the motion for new trial.

SUMMARY OF ARGUMENT

I.

Both in the indictment and instructions the statute was misconceived and misconstrued, and it was impossible to remove these misconceptions by argument. The Mann Act or White Slave Traffic Act as it existed at the time of the commission of the supposed offense and at the time of the indictment is in two parts. The first (Sec. 2421), prohibits *transportation* in interstate commerce; the second (Sec. 2422), forbids the *persuasion, enticement, inducement* or coercion of the female, and thereby to cause her to go in interstate commerce. The two offences are distinct and separate, and an indictment under one section will not support a conviction under the other.

In the present case, the indictment was drawn under Sec. 2422, which section is referred to by number twice in the body of the indictment. The other section, 2421, is nowhere referred to. Yet there was no evidence whatever of persuasion or other synonymous act, nor any hint of coercion. There is no reasonable inference in the evidence of any of these things. The woman did not even acquiesce; she went on her own.

The indictment does not charge an offense under Section 2422. It charges a conspiracy *to cause* the woman to go, not a conspiracy to *persuade, etc.* The indictment is not good under either section; not under Sec. 2421 because it does not charge *transportation,* nor under Sec. 2422 because it does not charge *persuasion* or coercion.

Suppose the case of a man carrying on immoral relations with a woman in California. The man unilaterally decides to go to the state of Washington, and the woman follows him there. Can it not be said that he caused her to go? Yet no offense under federal law would be committed. He caused her to go by taking himself away, but he did not "persuade, induce, entice or coerce" her to go. The indictment here merely charges appellant with conspiring with his co-defendant "*to* knowingly and unlawfully, and in violation of Title 18, U.S.C., Section 2422, *cause the said Patricia Lewis, alias Pat Lewis, to go* in interstate commerce from Portland, Oregon, to Seattle, Washington, with the intent and purpose * * * that the said Patricia Lewis should engage in prostitution * * * " (R. 3). Whether he conspired with her to cause her to go or

not, he is not charged with conspiring with her or anyone else to persuade or entice or induce her to go, and that is the offense which is punishable by the statute under which he is charged.

The same confusion of thought is noticeable in the instructions given by the court. The indictment is outlined fully (R. 182). There is no elaboration of the meaning of the words, "causing" the woman "to go." The words of the statute, "persuade, induce, entice, coerce" are mentioned (R. 185), but the jury is not told that they must find these things or any one of them in order to convict.

The woman who aids or assists in her own transportation is not guilty of a violation of the Mann Act. *Gebardi v. United States,* 287 U.S. 112. It follows that she cannot be guilty of conspiring to do so. *Idem*; see also, *Ellis v. United States,* 138 F.(2d) 612 (8th Cir.) And for a stronger reason, if she cannot be guilty of conspiring to commit the crime, she cannot be guilty of conspiring to persuading herself to do so.

II.

The evidence establishes parallel action, not conspiracy. The two defendants found themselves in Portland in the state of Oregon. Both desired to go to Seattle, Washington. By pooling their resources they could go cheaper. Although this was a fraud on the airline, it was not an offense against the United States. Each had his own purpose in going to Seattle, she to get her clothes and a supply of narcotics; his purpose is not specified, but there is nothing in the evidence to

lead even to an inference that it had anything to do with her.

Even if appellant had prostitution in mind in making the journey, there is nothing to lead the reasonable mind to believe that his plans included his co-defendant. Later, it is true, he opened a house of prostitution in Seattle, but there is nothing to show that he had even this in mind at the time of the trip. And while the co-defendant became an occupant of that house, it was upon the solicitation of the witness, McCandless, not appellant. There is nothing but coincidence here.

The opening of the house on 22nd Avenue was on January 23rd and the journey was completed January 5th. Much came between these two dates. The co-defendant was arrested, confined in the city jail, bailed out, and the charge was ultimately dismissed. Appellant had nothing to do with any of these things. In short, the conspiracy, if it ever existed, came to an end long before the house was opened.

Appellant did not cause his co-defendant to go from Portland to Seattle, nor did he conspire with her to induce her to go. She had made up her mind—indeed she had a compelling cause if we are to believe her story that she had run out of narcotics; the trial judge believed that she was a genuine addict (R. 164)—and she would have gone back to Seattle with or without him.

The crime of conspiracy is "always predominantly mental in composition because it consists primarily of a meeting of minds and an intent." *Krulewitch v. Unit-*

ed States, 336 U.S. 440, 448, 93 L.Ed. 790, 796. There is no evidence to show that appellant had any intention to conspire to induce his co-defendant to persuade herself to go in interstate commerce for prostitution.

While conspiracy cases are difficult of proof, there is still the requirement that to convict there must be proof beyond a reasonable doubt. Conspiracy is not an omnibus charge under which the sins of a lifetime may be shown. Nor can a conspiracy be implied or constructed except as shown by evidence. And the usual rule prevails in conspiracy as in other crimes, that if the conviction rests upon circumstantial evidence, the evidence must exclude every reasonable hypothesis of innocence; the facts proved must all be consistent with and point to the guilt of the defendant only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and consistent with them all. If the evidence can be reconciled with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

The appellate court will examine the evidence in this type of case, even after the verdict of a jury, to determine whether a crime has been committed. *Mortensen v. United States,* 322 U.S. 369, 88 L.Ed. 1331.

III.

During the course of the trial, reversible error was committed in several particulars.

A. The airline ticket stubs (Ex. "1" and "2") were

taken from the co-defendant upon her arrest in Seattle about five hours after the arrival of appellant and co-defendant. They were not shown as having been in his possession or under his control, nor were they issued to him. They were admitted over objection (R. 49), on the promise they would be connected up. Although the jury was instructed generally that acts and statements of one defendant would not be binding upon the other, unless a conspiracy was shown, there was no direct reference to them. These documents bore appellant's name and probably weighed heavily against him.

B. In proving the case the Government relied almost entirely upon hearsay. The Government's case in chief was the testimony of Beulah Smith that the defendants contemplated a trip to Portland; the testimony of Millard M. Bush, Jr., that he was told that the co-defendants rode from Portland to Seattle together in an airplane, having pooled their funds for the payment of the tickets. To show that appellant made the trip from Portland to Seattle for the purpose of prostitution and debauchery, hearsay was introduced through the witness, McCandless, showing the opening and operation of a house of prostitution at 724 22nd Ave. S., Seattle, in which the co-defendant and alleged co-conspirator stayed for a time.

C. Other hearsay declarations were permitted showing the commission of crime, and that appellant was a loathsome character. A cautionary instruction was given that such evidence was not proof of the crime charged in the Indictment (R. 72), but in the final instructions, the jury was told that the evidence might

be considered if they found that a conspiracy existed (R. 186).

D. The operation of the house on 22nd Avenue, told by the witness, McCandless, was admitted under the guise of intent. Motion was made to strike all this testimony, and denied. This came after the conspiracy, if any, had ended, and hence was inadmissible.

E. The co-defendant was subjected to a rigorous cross-examination, in which her "brushes with the law" were thoroughly explored. The federal rule is that only convictions of crime may be shown to impeach a witness, and such convictions must rise to the dignity of a felony or petit larceny. Many arrests in different states were shown, all to the prejudice of the appellant.

IV.

The instructions given by the court have already been discussed in part. They were further faulty in a serious particular. The court told the jury that they must convict both or acquit both. Appellant did not take the stand, his co-defendant did. The evidence thus was not the same as to each defendant, and to require the same verdict as to both is to ignore the differences in the evidence. Nor can such instruction be justified on the ground that the jury must have found that a conspiracy existed. Declarations and acts of one not done or said in the presence of or with the sanction of the other, to be admissible, must be shown to have been in furtherance of the conspiracy. Many of the acts done and things said here were for the individual's own benefit. The co-defendant might have convicted her-

self by her own admissions of crime. She was seriously impeached. Appellant had no convictions, and also exercised his privilege of remaining silent. By the instruction complained of he was denied the benefit of these things.

ARGUMENT

I.

ONE CANNOT CONSPIRE TO PERSUADE ONESELF AND THE INDICTMENT, THEREFORE, DOES NOT CHARGE A CRIME

The Indictment charges a conspiracy under Title 18, Section 371 to violate Section 2422 of the same title. A reading of the latter section will show that the gist of the crime is the persuasion, enticement, inducement or coercion of a woman or girl. If one exercises these blandishments or pressures *and thereby causes the female to go* in interstate commerce for the purpose of prostitution or debauchery, he violates the law as expressed in Section 2422. But if the woman is caused to go by any other means than those designated, the defendant is not guilty.

We are taught by *United States v. Holte,* 236 U.S. 140, 35 S.Ct. 271, 59 L.Ed. 504, L.R.A. 1915D, 281, that a woman may be guilty of conspiracy to transport herself. But there it was *transportation* that was involved, not *persuasion.* And in the often cited case in this circuit, *Corbett v. United States,* 299 Fed. 27 (9 Cir. 1924), the woman solicited her own transportation in interstate commerce; in other words she took an active part in the conspiracy to *transport* herself. There was noth-

ing involving persuasion or inducement of herself by herself; she persuaded the man to send her the money for the ticket so that she could get to Boise. And she was indicted for conspiracy to transport herself, not to persuade herself.

In *Gebardi v. United States*, 287 U.S. 112, 77 L.Ed. 206, 53 S.Ct. 35, it was held that a charge of conspiracy *to transport* was not sustained by evidence of mere acquiescence. The woman not being punishable under the Act for transporting herself, could not be indicted for agreeing to such transportation. If she could not be held for conspiracy to transport, how much less can she be held for conspiracy to persuade herself?

> "Where the criminality of conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment." *Pettibone v. United States,* 148 U.S. 197, 203.

Under Section 2422 the purpose must be to persuade, induce, entice or coerce, yet these words are nowhere used in the Indictment.

If the act sought to be punished consists in conspiring to *transport* a woman, then the indictment must be laid under Section 2421. And where the indictment is drawn under Sec. 2 of the Act (Sec. 2421), a conviction cannot be sustained where the evidence shows a violation, if any, under Sec. 3 (Sec. 2422). *LePage v. United States,* 146 F.(2d) 536 (C.C.A. 8th 1945); *Graham v. United States,* 154 F.(2d) 325 (C.A. D.C. 1946).

In *United States v. Martin,* 191 F.(2d) 569, the Court

of Appeals for the Seventh Circuit, reversing the district court in *United States v. Holz,* 103 F.Supp. 191, held that a woman defendant was not guilty of conspiracy to violate the statute. She had been indicted together with her co-defendant, Martin, for violation of Sec. 2421, and of conspiracy to violate said section. The Court of Appeals found that the defendants met at Kankakee, Illinois, and the male defendant then drove the female in his own car from that place to Logansport, Indiana. The woman did nothing more than assent to and acquiesce in her own transportation, which was for the purpose of placing her in a house of prostitution. Under the rule of the *Gebardi* case (287 U.S. 112), it was held that she could not be found guilty of conspiracy. *Miller v. United States,* 95 F.(2d) 492 (9th Cir.), was cited in support of the decision.

It is very doubtful, in light of the *Gebardi* case (287 U.S. 112), whether an indictment could ever be framed for conspiracy to violate Sec. 2422. This section formerly contained the words, "aid or assist" in the inducement of the prohibited transportation. These words were removed by the 1948 amendment.[5] In the *Gebardi* case the Supreme Court said:

> "Section 3 of the Act (U.S.C. Title 18, Sec. 399), directed toward the persuasion, inducement, enticement or coercion of the prohibited transportation, also includes specifically those who 'aid or assist' in the inducement or the transportation. Yet

[5] The reviser's notes say: "The references to persons causing, procuring, aiding or assisting were omitted (in the 1948 amendment) as unnecessary as such persons were made principals by Section 2 of this title (Title 18)."

> it is obvious that these words were not intended to reach the woman, who *yielding to persuasion,* assists in her own transportation." *Gebardi v. United States,* 287 U.S. 112, 119, (footnote 2), 77 L.Ed. 206, 209, 53 S.Ct. 35, 84 A.L.R. 370, 373. (Italics supplied.)

What the *Gebardi* case, decided in 1932, does to the *Corbett case* (299 Fed. 27) (9th Cir., 1924) is difficult to say. It is doubtless because of this that the trial judge was in doubt, but nevertheless felt that he should sustain the Indictment (R. 169). It may be that because of the active solicitation by the woman of her own transportation in the *Corbett* case, that case represents the exceptional situation envisaged in the *Holte* case (236 U.S. 140). And it may be reconciled upon the principle laid down by this court in *Stack v. United States,* 27 F.(2d) 16 (C.C.A. 9). That principle has been stated as follows:

> "The final question relating to agreement and the one which has most confused the decisions of the Circuit Courts of Appeals now arose: Will mere participation in crime amount to conspiracy to commit it? . . . The Ninth circuit took the ground that participation in the substantive offense might or might not prove conspiracy and illustrated its view by affirming the conviction of the owner and the cashier of a cafe who sold liquor illegally and reversing that of the waiter who served it. *Stack v. United States, . . .* " 23 *Virginia Law Review* 909.

In the case at bar, however, the woman did nothing but go from Oregon to Washington, and the evidence shows that she would have gone anyway. It does not appear that she persuaded Blassingame to go with her,

nor that Blassingame persuaded her to go. Since the Supreme Court held in the *Gebardi* case that Congress in the Mann Act evinced an intention to let the woman's participation go unpunished and she could not, therefore, be held for conspiracy, it is submitted that no crime was committed even if the Indictment had been laid under Sec. 2421. Certainly there was none under Sec. 2422.

II.

THERE WAS NO PROOF OF ANY CONSPIRACY AND THE MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED

One cannot conspire by oneself, it requires at least two persons to make a conspiracy. Therefore, if Mary Donna Songahid, alias Patricia Lewis, the co-defendant, cannot be held for the crime of conspiracy, the appellant must also be released. *Gebardi v. United States,* 287 U.S. 112, 123, 77 L.Ed. 206, 212, 53 S.Ct. 35. In that case the court said (p. 123):

> "On the evidence before us the woman petitioner has not violated the Mann Act and, we hold, is not guilty of a conspiracy to do so. As there is no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be reversed."

If there was a conspiracy formed in Seattle prior to the trip to Portland (and this is not alleged) the proof of it must rest in the testimony of the witness Beulah Smith. There is no other testimony of any witness which tells of the plans of the appellant and Mrs. Songahid, except that of Mrs. Songahid herself.

The witness Smith testified that she had known Blassingame three or four years (R. 19). She met Mrs. Songahid (Pat Lewis) "along about the last of 1952," when Mrs. Songahid came up to her house with Blassingame (R. 19). The witness testified that she fixed something to eat, they sat and played some records, and she left and he left (R. 20). There was no discussion of prostitution. Apparently there were other visits (St. 12), but the only evidence pertaining to a journey was this:

> "(By Beulah Smith) Well, I don't know, the last time she was up to my house, we was supposed to go away some place, and I wanted to go with them. That is all I know." (St. 23)
>
> * * *
>
> By Mr. Harris:
>
> Q Did she at any time during the latter part of 1952 tell you she was going to go away, or go on a trip?
>
> A Yes. I wanted to go. Two or three of us was supposed to go. I wanted to go, but then Sam did tell me I couldn't go because there would be no colored people where they were going. (R. 24)
>
> * * *
>
> The Court: The answer may be stricken (R. 24).
>
> * * *
>
> Q Mrs. Smith, did Pat Lewis say where she was going?
>
> A She said she was going to Portland. That is all I know. (R. 25)
>
> Q What, if anything, did you say to her after that or—Yes, what, if anything, did you say to her when she told you she was going to Portland?

A Well, we just talked as usual; nothing in particular.

Q Well, did you—did you have—did you ask Sam Blassingame anything at this time?

A Yes. I told you I asked him, and he said there would be no colored people where he was going.

Q What did you ask him?

A I wanted to go with him. (R. 25)

Q What did he say?

A He just said there wouldn't be any colored people where he was going, and I couldn't go.

Q Did Pat Lewis tell you why she was going to Portland?

A She just said she was going to make some money. That is all.

Q Did Sam Blassingame tell you why he was going to Portland?

A No. (R. 26)

* * *

Q Why did you ask Sam Blassingame to go to Portland with him?

A Well, I always go somewhere with him. We always ride around the street together, and we were friends, and I didn't think that there was any harm if he was going off, if I could go with him.

Q From Seattle to Portland?

A Yes." (A. 29)

The police officers, Scott, and Francis, testified as to the search of the person of the defendant Songahid when she was booked at the Seattle Police Station, after the arrest in her home January 5th. The two defendants arrived at the Seattle air terminal about five o'clock that evening. Each defendant went to his re-

spective home, and the defendant Songahid was arrested early in the morning of the 6th; the search was made pursuant to this arrest.

During the search two airline ticket stubs were taken from the person of the defendant Songahid and were introduced in evidence as Exhibits "1" and "2" (R. 39, 49).

The testimony concerning these exhibits came from the witness Bush, an FBI agent (R. 97), the witness Caughey, the ticket agent (R. 54), and the co-defendant, Songahid. Bush, over objection by Blassingame (R. 98), on grounds of hearsay, testified that Mrs. Songahid told him at the jail that she went to Portland for the purpose of practicing prostitution and of her activities there; that she visited her friends, Alvina Neuman and Madison Wilson, and on January 5, 1953, she decided to return to Seattle to get her clothes and renew her supply of narcotics. She told Mr. Bush that when she arrived at the airport she saw Blassingame. This was the first time she had seen him since leaving Seattle. She had known him merely as an acquaintance and had no connection whatsoever with him (R. 100).

While at the airport they decided to purchase their tickets together as man and wife; by these means they could get the benefit of reduced fare, as a wife could travel at half fare (R. 100). She gave Blassingame the money for her ticket and he purchased the tickets for both, and they rode side by side to Seattle (R. 100). Upon arrival at the Seattle airport, they took a taxi and went to their respective homes. (Mr. Bush recalled that Mrs. Songahid told him that the taxi took them

to an address on Jackson St., where Blassingame got his own car and drove her home. Mrs. Songahid testified that this was incorrect, and that he took her all the way to her own home in the taxi.)

Whatever may be the fact as to the completion of the journey, there can be no doubt that Blassingame did not see or communicate with Mrs. Songahid until after she was released from jail three days later. He dropped her off and went on his own way to his home. He had nothing to do with her arrest, was not present at any time in her home, either before or after her arrest, and did not visit her in jail.

Mrs. Songahid's testimony on her own behalf did not differ materially from the account given by Mr. Bush. She saw Blassingame at the airport in Portland, January 5th; this was the first time she had seen him in Portland (R. 109), although some friends told her he had been there (R. 142). She had known Blassingame and his wife for some years, and had lived in his home; Mrs. Blassingame took her in when she was ill (R. 133). She identified Mrs. Blassingame in the court room and knew they had three children (R. 116).

Although she went to Portland to practice prostitution, her return to Seattle was not for that purpose. She said she wanted to get her clothes and obtain some narcotics (R. 115). She could not replenish her supply in Portland as she had no "connection."

She had been accustomed to going from state to state in pursuit of her calling, and always went on her own; Blassingame never took her anywhere (R. 121). She did not discuss with him her purpose in going from

Portland to Seattle (R. 115-115), nor did she talk about opening a house in Seattle (R. 116-117). She did not go to Portland with him, she went from Seattle to Portland by herself (R. 120).

When Blassingame saw her at the airport in Portland, he asked her if she was going to Seattle. She gave him the money for her own ticket and he bought both tickets; she said they could get them a little cheaper that way (R. 110).

This was the Government's case to establish a conspiracy to violate Sec. 2422, Tit. 18, U.S.C.A. The only other witnesses who testified were Patsy Ruth McCandless (R. 62), and Charles H. Winston. Mrs. McCandless testified that the appellant rented a house on 22nd Avenue South in Seattle; that appellant induced her to move there and that she practiced prostitution there and the defendant Songahid was also an inmate of that house. The testimony was admitted only to show intent on the part of the defendants (R. 70). Mr. Winston was the real estate broker who handled the renting of the house.

It is submitted that the foregoing is wholly insufficient to prove the conspiracy. No substantive crime is charged against either defendant.

> "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means * * *
>
> "It is a partnership in criminal purposes. * * * "
> *Marino v. United States,* 91 F.(2d) 691 (9th Cir.), 113 A.L.R. 975.

The fact that conspiracy cases are difficult of proof does not dispense with the requirements that there must be proof beyond a reasonable doubt. *United States v. St. Louis Dairy Co.,* 79 F.Supp. 12. Mere suspicions or association cannot establish the conspiracy; there must be some evidence of participation in the commission of the offense; *Dong Haw v. Superior Court,* 183 P.(2d) 724, 727 (Cal.); *People v. Long,* 93 Pac. (Cal.) 387, 390; *People v. Zoffel,* 95 P.(2d) (Cal.) 160. Presumptions of guilt are not lightly to be indulged in from mere meetings. *United States v. Di Re,* 332 U.S. 581, 593, 92 L.Ed. 210, 219; *United States v. Maloney,* 200 F.(2d) 344, 347 (7th Cir.).

The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment, which may limit the scope, but cannot extend it. *Terry v. United States,* 7 F.(2d) 28 (9th Cir.)

> "Conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry v. United States,* 7 F.(2d) 28 (9th Cir.).

> " * * * There can be no judge-made offenses against the United States and every federal prosecution must be sustained by statutory authority. No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence * * * ." Jackson, Frankfurter and Murphy, JJ. in *Krulewitch v. United States,* 336 U.S. 440, 456, 457, 93 L.Ed. 790 801.

Proof of conspiracy must rest in evidence *aliunde;* the conspiracy may not be established by hearsay

declarations of one of the co-conspirators. *United States v. Schneiderman,* 106 F.Supp. 892, 901.

The general rules governing criminal trials apply likewise in cases of conspiracy.

> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and, where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence." *United States v. Lancaster,* 44 Fed. 896, 904, 10 L.R.A. 333; quoted in *Terry v. United States,* 7 F.(2d) 28 (9th Cir.).
>
> "I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled with either the theory of innocence or with guilt, the law required that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted." *United States v. Richards* (D.C.) 149 Fed. 443, 454, quoted in *Terry v. United States, supra* (9th Cir.)

The purpose of the journey is what determines whether the statute is violated. If the journey is under-

taken for an innocent purpose, the fact that an unlawful design is formulated after the transportation is complete does not render the transportation criminal. *Gillette v. United States,* 236 Fed. 215. Here there is nothing to establish that the two defendants had other than a legitimate purpose in going from Portland to Seattle. They met at the airport and decided to share their resources to make the trip cheaper. True, there was a design to defraud the airline, but that is not the offense. So the only conspiracy is one that is not punishable.

In *Mortensen v. United States,* 322 U.S. 369, 88 L.Ed. 1331, the defendants operated a house of prostitution in Nebraska. They planned an automobile trip to Yellowstone National Park, and two of the girls who were inmates of the house asked to go along for a vacation. The trip was made, and upon their return the girls resumed their unlawful vocations. The defendants were convicted of violation of the Mann Act before a jury upon appropriate instructions, and the judgment was affirmed by the court of appeals for the eighth circuit. The Supreme Court reversed, holding there was no competent or substantial evidence to support the judgment.

There is nothing in the evidence showing previous sexual relations between the defendants, nor of association for purposes of prostitution, nor was there any suggestion of prostitution either before or upon the journey. Cf. *Johnson v. United States,* 215 Fed. 679. If a connection between the two defendants having its basis in immoral conduct or prostitution ever existed it was long after the journey was complete, certainly not

before the opening of the house on 22nd South. As to that house, it plainly appears that Blassingame went into this venture to make use of the talents of the witness McCandless, not his co-defendant.

While the jury might have been entitled to disregard Mrs. Songahid's testimony that there was no discussion of prostitution between appellant and herself, if a course of conduct between them was shown to overcome the denials, *United States v. Boston,* 134 F.(2d) 484 (2nd Cir.), here there was nothing prior to or at the time of the transportation which justified a refusal to credit the testimony. The operation of the house on 22nd Avenue came so long after the transportation as not to be referable to it.

> "But a different situation affects the prostitution counts. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago the defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that the defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal conviction cannot be allowed to rest on suspicion and there were no supplementary facts like those that support the sexual intercourse counts,—no proof that the defendant had ever been connected with or interested in brothels, or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution." *Johnson v. United States,* 215 Fed. 679, 682, L.R.A. 1915A 862 (C.C.A. 7th).

To sustain a conviction it is necessary to find that it was the persuasions of the defendant that caused the

woman to go. *Welsch v. United States,* 220 Fed. 764, 771. There the court said:

> "In the case at bar there is nothing but speculation and conjecture upon which to rest a finding of that persuasion that the act denounces, while the interstate journey was to the girl's own home, a home of unquestioned respectability, in which she had lived for years and in which she continued to live for nearly or quite a year afterwards, with all the outward appearance of innocence and virtue."

That the purpose of the journey is of great importance in determining whether the conduct is criminal is shown *by Gillette v. United States,* 236 Fed. 215. There the defendant invited a girl to dinner. He was then called away on a business trip to another state. From there he telephoned the girl and asked her to keep the date in the sister state. They became intoxicated and sexual intercourse followed. It was held the evidence failed to show any criminal intent.

It is true that the unlawful intent or purpose may be inferred from the conduct of the parties within a reasonable time before and after the transportation. *United States v. Oriolo,* 49 F. Supp. 226 (D.C. Penna.). In that case the woman had worked for the defendant as a prostitute in Philadelphia before the events which led to the indictment. He took her by automobile on a vacation trip to Atlantic City. While there he was arrested and the car was impounded. They returned to Philadelphia by train. Before the train entered the state of Pennsylvania, he told her she would have to practice prostitution in order to pay the fine levied in

New Jersey. It was held that this was sufficient to show unlawful purpose of the journey.

In *United States v. Reginelli,* 133 F.(2d) 595 (C.C.A. 3), the defendant went from Camden, N. J. to Miami, Florida. From there he wired and telephoned the girl at Camden, expressing a desire for her company. She boarded an airplane in Philadelphia and joined him in Miami, using a ticket which he purchased for her. The immoral acts were committed in Miami. The girl testified that the trip was her own idea and that the defendant was opposed to it. The conviction was sustained, the court being of the view that the immoral purpose of the journey could be inferred from the subsequent acts and conduct.

In the case at bar there is nothing to show that prostitution or debauchery or other immoral purpose was involved. Certainly nothing happened at or near the end of the journey from Portland to Seattle to indicate any such thing. The only shred of evidence of anything later is the testimony of McCandless that she saw the co-defendant give appellant money at one time (R. 78-79). This was at the house on 22nd Avenue, long after any conspiracy was ended (the journey was completed January 5th and the house was not rented until January 23rd). *Krulewitch v. United States,* 336 U.S. 440, 442, 93 L.Ed. 790, 793. And besides, a reasonable explanation was offered: Mrs. Songahid said that she never gave Blassingame any money, but that she had paid back money that she borrowed from him (R. 114).

In *Fisher v. United States,* 266 Fed. 667 (C.C.A. 4th), it was held that where a defendant, who had been car-

rying on an illicit relationship with a girl, took her across the state line for a brief visit with relatives, returning the same day, after which their relations were resumed, there could be no conviction of violating the Mann Act.

> "Where an interstate journey was taken definitely for another purpose, and would have been taken in any event, the fact that illicit intercourse took place in the course of the journey, as an incidental occurrence, did not bring the case within the meaning and intent of the statute, and would not sustain a verdict of guilty." (p. 670)

Suppose it be conceded for the sake of argument that appellant intended upon arrival in Seattle to set up a house of prostitution, and that he transported his co-defendant to Seattle. He still would not be guilty of any offense under the statute. The Government must establish that appellant either transported or induced his co-defendant to agree to her transportation for the purpose of prostitution. A general evil intent is not enough; the intent shown must be particular, and it must appear that the purpose was to use that particular woman for that particular purpose. As was said by the Supreme Court in the *Caminetti* case (242 U.S. 470, 491, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168):

> "It may be conceded, for the purpose of argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate com-

merce of women and girls with a view to the accomplishment of the unlawful purpose prohibited."

Appellant set up the house on 22nd Avenue with the McCandless woman in mind. This witness was not sure when she met appellant, but said it was in January, 1953. (The journey ended on January 5th). He asked her about being his "old lady" (R. 65). She asked to be allowed to think it over (R. 72). About three days later, she agreed and moved into the house (R. 73). She was with him when he rented the house on January 23rd (R. 74).

From this it plainly appears that the journey from Portland to Seattle was not taken with any thought of prostitution so far as Mrs. Songahid was concerned; the idea of opening a house for Mrs. McCandless came a great deal later.

Intent is an essential ingredient in the crime of criminal conspiracy, and must be established like any other fact, beyond a reasonable doubt. *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790.

> "It is always predominantly mental in composition because it consists primarily of a meeting of minds and an intent." *Krulewitch v. United States,* 336 U.S. at 447.

As stated in the law review article which had the approval of the concurring judges in the *Krulewitch* case:

> "To prove a conspiracy it must be shown that the accused had knowledge of it, but mere knowledge or even approval of an unlawful design are not in themselves sufficient. The evidence must establish that there was unity of intent on the part of two or more persons to accomplish the end charged. That

which gives the crime its 'distinctive character,' said a Pennsylvania court, 'is unity of purpose, unity of design, focolization of effort on a particular project by the persons named in the indictment.' *Comm. v. Zuern,* 16 Penna. Supr. Ct. 588, 600. In *State v. King,* 104 Iowa 727, 74 N.W. 691, the accused, who had a grievance against *W,* told *D* if he would whip *W* someone would pay his fine. *D* replied that he did not want anyone to pay his fine, that he had a grievance of his own against *W* and that he would whip him at the first opportunity. Shortly after that *D* did beat *W* very severely. The accused did not assist *D* but, as the latter was withdrawing from the assault, the accused indicated satisfaction with what *D* had done. These facts did not establish a criminal conspiracy. There was no proof, said the Court, 'of any concert of action, or of any understanding or agreement therefor.' 'The mere knowledge,' it went on to say, 'acquiescence, or approval of an act, without co-operation or agreement to co-operate, is not enough to constitute the crime of conspiracy.' *D* had the intent, it was to be observed, to commit an assault on *W*. The accused had a like intent or, at least, was willing to enter into a scheme which contemplated an assault on *W*. But *D* did not intend to make a common cause with the accused of an assault on *W*. The evidence failed to establish an agreement.'' Harno, Intent in Criminal Conspiracy, 89 Univ. of Penna. Law Review 624, 633.

Continuing, this author says:

''The crime of conspiracy . . . is heavily mental in composition. In the majority of crimes it is the act with which the law is most concerned; the intent in those crimes is a factor that must be established as a condition to holding the accused criminally re-

sponsible for the act. It is present when one harbors an intention to do an anti-social act, and it is greater when two or more hold it separately. Their behavior becomes criminal when they agree to make a common cause of committing that act. Their agreement, it is said, is the act in criminal conspiracy. In truth, it is but a step toward the accomplishment of another act, the commission of which the state wishes to prevent. The agreement is a step toward the accomplishment of a specific anti-social act. Turner has pointed out (Turner, Attempts to Commit Crime (1934) 5 Camp. L. J. 230, 235) while 'it is a broad rule of our Common Law that *mens rea* can be *either* the state of mind of the man who intends the consequences of his conduct, *or* the state of mind of the man who realizes what the consequences of his conduct may be and who . . . is reckless or indifferent to them,' that the crime of attempt requires a *mens rea* of the former kind exclusively. So it is with criminal conspiracy. Criminal conspiracy involves a specific intent to commit a particular act, the perpetration of which the state desires to forestall. As a problem in procedure, to establish a criminal conspiracy the state must prove an agreement on the part of two or more persons, and it must prove that the common intent flowing from that agreement was specific and was criminal." Harno, op. cit. p. 635.

And in conclusion, he says:

"The view is here advanced that these dangers would tend to be reduced once the basic principles of the crime and particularly the role of the intent element is clearly understood. The gist of the crime lies not, as has been often said, in the agreement. The agreement is a factor, but it is no more than that. The gist of the crime is in the intent. . . . Con-

spiracy is an *inchoate* crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned. The essence of the crime thus lies in intent." (*Id.*, p. 646)

III.

REVERSIBLE ERROR RELATING TO THE ADMISSION AND EXCLUSION OF EVIDENCE WAS COMMITTED DURING THE COURSE OF THE TRIAL

A. The ticket stubs, Exhibits "1" and "2" were not brought home to the appellant, hence were inadmissible as to him.

Exhibits "1" and "2" were passengers' coupons issued at the time the fare is paid. The flight coupon is given in exchange for passage and the exhibits are the part which the passenger keeps for his own records (R. 57). They were issued by the witness Caughey in Portland (R. 56).

When the co-defendant, Songahid, was arrested and booked, these exhibits were in her possession. At the booking office she was observed tearing something off a paper she had in her hand (R. 37). The portion she tore off bore the names "Mr. and Mrs. Sam Blassingame" (R. 37-38). Appellant's counsel objected to this showing but was overruled, and the court told the jury that the evidence pertained to the co-defendant only (R. 36). The exhibits were admitted and went to the jury (R. 49), on the promise they would be connected up with appellant.

There was nothing in the court's instructions at the

conclusion of the trial concerning these exhibits. They were not connected up unless we can say that the evidence establishes a conspiracy.

B. The hearsay declarations made in the absence of appellant, were prejudicial, and constituted reversible error.

The witness, Scott, a police officer, testified over objection, that a soldier named Parks said that he performed an act of prostitution with the co-defendant (R. 34). The witness further testified the co-defendant denied this (R. 33-34). Objection to hearsay testimony was taken twice (R. 32-33).

The witness, Smith, was permitted to relate conversations with the co-defendant which established that the co-defendant was a prostitute (R. 21, 23). Objection was taken each time by counsel for appellant on the ground of hearsay, but was overruled (R. 21-22).

The witness, McCandless, was permitted to testify that the co-defendant told her that the co-defendant and appellant had taken a trip to Portland (R. 83). Objection was taken on grounds of hearsay (R. 79), and on the further ground that the conversation took place after the termination of the conspiracy (R. 80).

The fact that the trip from Portland to Seattle was established by the Government through the testimony of an F.B.I. agent, Bush, who related what the co-defendant told him in the city jail after her arrest in Seattle upon completion of the journey (R. 99-101). Objection was taken to this testimony on the ground of hearsay (R. 98).

The testimony of the witness McCandless concerning a journey was objected to by counsel for Blassingame as incompetent (St. 83-86). It appeared that Blassingame was not present (St. 83). This objection was overruled but the court instructed the jury that before they could consider it they must find that a conspiracy existed (St. 84). Then the following occurred:

By Mr. Harris:

"Q What, if anything, was said then by Pat Lewis to you concerning a trip to Portland?

A Well, she said that she and Sam went to Portland.

* * * * * * * *

A She said her and Sam had went to Portland.

Q Had went?

A Had gone to Portland; had already been to Portland." (St. 88)

The foregoing testimony was inadmissible, not only on the ground of hearsay, but for other reasons. It was something that occurred after the conspiracy had ended, for if the object of the conspiracy was to induce the woman defendant to go from Portland to Seattle for the purpose of prostitution, the conspiracy had ended in success long before. *Krulewitch v. United States,* 336 U.S. 440, 442, 93 L.Ed. 790, 793. Furthermore, it was after the arrest of the woman defendant (*Id.*). What Songahid told McCandless was in no sense something said or done in pursuance of a conspiracy. It was but a narrative of past events and is clearly without the rule that renders the declaration of a co-conspirator admissible in evidence. *State v. Nist,* 66 Wash. 55, 118 Pac. 920.

In *Fiswick v. United States,* 329 U.S. 211, 91 L.Ed. 196, the defendants were indicted for conspiracy to defraud the United States by concealing and misrepresenting their membership in the Nazi Party. There was no direct evidence to convict. The district court admitted into evidence damaging admissions by each co-conspirator to agents of the FBI, after he was apprehended. Held, that since these admissions were made after the last proven overt act, they should not have been allowed, and reversible error was committed.

C. Hearsay declarations were allowed which imputed to the defendants the commission of other crimes.

The witness, McCandless, was permitted to testify that appellant asked the witness to be his "old lady" (R. 64). By this was meant working for him in a house of prostitution (R. 71-72). Objection was taken (R. 66, 67, 69, 71 and 73). The witness further was permitted to tell of a conversation in which the appellant was supposed to have told the witness what to charge for the acts of prostitution (R. 77), to which objection was taken (R. 77). Again, she was allowed to tell about committing acts of prostitution at the house on 22nd Avenue, to which objection was taken (R. 77).

> "Sometimes, although to our apprehension much less frequently than is perhaps generally supposed, jurors do altogether miss the issue they are to try. They are not altogether unlikely to do so, if it appears there is no question that the defendant has done something, whether charged in the indictment or not, for which he richly deserves condign punishment. . . . " *Van Pelt v. United States,* 240 Fed. 346.

D. The motion to strike all of the testimony of the witness, McCandless, admitted only for the purpose of showing intent, should have been granted.

The testimony of this witness related entirely to the opening and operation of the house on 22nd Avenue South, Seattle. This house was rented January 23, 1953. What we know about the operation of this house is obtained from the testimony of this witness. She testified over objection that after appellant asked her about being his "old lady" and waiting three days for her answer (R. 73), he drove her from Beulah Smith's place to the house. She took her clothes and the trip was made in his car (R. 73-74). She was with him when the house was rented (R. 74), and stayed there about a month (R. 78).

According to the witness, the place was operated as a house of prostitution and appellant told the witness what to charge (R. 75-76), to which objection was taken and overruled (R. 76-77). The money was turned over to appellant (R. 78), to which testimony objection was taken.

This witness was also permitted to testify over objection, that co-defendant told her that she and appellant had made a trip to Portland together (R. 79-83). She also testified over objection that the co-defendant turned money over to appellant (R. 78), and that the co-defendant boasted about how much she made (R. 79).

Was this testimony admissible to show the intent of the defendants in Portland when they pooled their funds and bought tickets on the United Airlines? We submit it is not. The trip from Portland was made January 5th; the house was rented January 23rd, and there

is nothing to show the slightest connection between the two defendants in that interim. The co-defendant became an occupant of that house at the suggestion of the witness, McCandless (R. 118-119). There is nothing in the evidence showing that the two defendants even saw each other from the time of their arrival in Seattle, January 5th, until two weeks after the house was rented, January 23rd.

In *Krulewitch v. United States,* 336 U.S. 440, 93 L. Ed. 790, the defendant was indicted for conspiracy to violate the Mann Act. The complaining witness testified that the defendant's co-conspirator came to her a month and a half after the complaining witness was induced to go in interstate commerce for the purpose of prostitution and asked her to conceal the crime. It was held that such hearsay declaration of the co-conspirator was inadmissible against the defendant. The court said:

> "The time of the alleged conversation was more than a month and a half after October 20, 1941, the date the complaining witness had gone to Miami. Whatever original conspiracy may have existed between petitioner and his alleged co-conspirator to cause the complaining witness to go to Florida in October, 1941, no longer existed when the conversation took place in December, 1941. For on this latter date the trip to Florida had not only been made —the complaining witness had returned to New York, and had resumed her residence there. Furthermore, at the time the conversation took place, the complaining witness, the alleged co-conspirator, and the petitioner had been arrested. . . .
>
> "It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complain-

ing witness to Florida for prostitution—had either ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. . . . The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The statement thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of the objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. . . . "

The general rule is that evidence is inadmissible which tends to prove a crime other than that charged in the indictment. *MacLafferty v. United States,* 77 F. (2d) 715 (9th Cir.). There are exceptions to the rule, and one of them and the one relied upon by the Government in this case is that where the state of mind of the doer of an act is an essential element to establish its criminal quality, the intent may be shown by other acts of like nature, even though they be in themselves crimes. But the exception is not applicable where the other crime is subsequent to the one charged in the indictment. The reason is that what one does, as in this case, on January 23rd or thereafter, is not proof of what one intends to do on January 5th. *Witters v. United States,* 106 F.(2d) 837 (App. D.C.), 125 A.L.R. 1030.

In *Hall v. United States,* 235 Fed. 869 (9th Cir.), the general rule was recognized that where intent is an element, other acts may be shown; but where the defendant was on trial for an assault upon a nine-year-old child, evidence of a similar assault upon another ten-year-old child 33 months before should not have been admitted. This court said:

> "It is, however, never to be lost sight of that the defendant is entitled to be tried upon competent evidence and only for the offense charged, and where there is matter collateral to the issue to be tried, it is the duty of the court to see that proof of collateral matter which can really only tend to prejudice the defendant with the jurors and to produce the impression that he is of low and depraved disposition is not admitted. . . . It is not a logical inference to say that testimony of an assault upon a child nearly three years previously shows that defendant had a design to make an assault nearly three years later upon another child. It is too plain, however, that proof of such collateral matter tends to produce the belief that defendant is a person of depraved moral character, and is highly prejudicial to the defendant on trial before a jury. . . . "

The hearsay declaration of a co-conspirator, to be admissible, must be made before the termination of the conspiracy, and in furtherance of its object. *Myola v. United States,* 71 F.(2d) 65 (9th Cir.). So also, "before the declaration of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made." *Id.*

The declarations of one co-conspirator are not sufficient to establish the connection of a third person with the conspiracy. *Id.; Kuhn v. United States,* 26 F.(2d) 463 (9th Cir.). Statement or declaration of a conspirator, to be admissible, must have been made during the continuance of the conspiracy and in furtherance of the object of the conspiracy. *Tofanelli v. United States,* 28 F.(2d) 581 (9th Cir.).

> "The declarations of one conspirator made in furtherance of the conspiracy, and during its existence, are admissible against all members of the conspiracy. . . . But a defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof *aliunde* of the existence of the conspiracy, and of the defendant's connection with it, before such statements become admissible against a defendant not present when they are made. *Glasser v. United States,* 315 U.S. 60 * * *." *Montford v. United States,* 200 F.(2d) 759, 760 (5th Cir.).

> "The Government * * * relying on the doctrine that the declarations of one co-conspirator in furtherance of the objects of the conspiracy made to third parties are admissible against his co-conspirators, *Logan v. United States,* 144 U.S. 263, 36 L.Ed. 429, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner v. United States,* 57 F.(2d) 506 (C.C.A. 10th); and see *Nudd v. Burrows,* 91 U.S.

426, 23 L.Ed. 286. Otherwise, hearsay would lift itself by its own boot straps to the level of competent evidence." *Glasser v. United States,* 315 U.S. 60, 75, 86 L.Ed. 680, 701.

E. The impeachment of the co-defendant was improper and prejudicial to the appellant's case.

In direct examination of the co-defendant by her own counsel, she was asked if she had had "brushes with the law in prostitution and dope" (R. 108). In the cross-examination of this witness this was carried to an unpermissible extent (R. 126-133). Brushes with the law were treated by Government counsel as including mere arrests, detention as a juvenile, *quasi* licenses to practice prostitution (R. 128-129), return to the reform school, parole revocation, etc. The cross-examination was finally stopped by the Court (R. 133), but the damage was done.

While some of the cross-examination might have been proper, that is, where convictions of felony were shown, there was a great deal that was improper. It was not designated to impeach the witness, but to show that she was a person of low and dissolute character. The rule is that acts of misconduct, not resulting in conviction of crime, are not proper subjects of cross-examination to impeach a witness. *Echert v. United States,* 188 F.(2d) 336 (8th Cir.), 26 A.L.R.(2d) 752.

In *Mitrovich v. United States,* 15 F.(2d) 163 (9th Cir.), this Court said:

> "On cross-examination the court permitted counsel for the government to ask the plaintiff in error whether he had not been arrested on one or more previous occasions. An objection to this testi-

mony was interposed and overruled. The witness answered, 'Twice.' The ruling admitting this testimony was, in our opinion, both erroneous and prejudicial. * * * Counsel for the government invokes the rule that a defendant who takes the witness stand in his own behalf waives his constitutional rights, and places himself on the same footing as any other witness, and the further rule that the scope of cross-examination is within the discretion of the trial court. With these rules we have no quarrel, but the question whether a party had been arrested is not a proper question to be propounded to any witness on cross-examination for the purpose of discrediting him, and the mere discretion of the court is not broad enough to justify the admission of testimony which is otherwise manifestly incompetent and prejudicial. The court below sought to justify its ruling upon the ground that the plaintiff in error had gone somewhat extensively into his past history on direct examination, but there was nothing in the direct examination tending even remotely to show that the plaintiff in error had not been arrested for crime. No such question was asked, and no such answer was made. The question propounded on the cross-examination was therefore wholly foreign to anything found in the direct examination."

IV.

THE COURT GAVE ERRONEOUS INSTRUCTIONS TO THE JURY

A. The court did not properly define the crime with which the defendants were charged.

The court correctly stated the law under Sec. 2422 (R. 185), but left the impression that the defendants were charged under that section and not for *conspiracy* to

violate that section. Conspiracy was later defined (R. 187), but the jury was told that the offense was *conspiracy to transport,* not *conspiracy to persuade.* From this the jury could well conclude that if the evidence showed that the defendants conspired together that the co-defendant should be *transported* from Portland to Seattle, then appellant could be found guilty. But this is not so; he could only be convicted if it was shown that he conspired so that the co-defendant was *persuaded* to go.

Of course, under the *Gebardi* case (287 U.S. 112), appellant could not be convicted because the woman, "who by yielding to persuasion, assists in her own transportation," could not be guilty of conspiracy; and the appellant did not conspire with anyone else.

B. The court told the jury that appellant could be convicted without proof, and merely because they found the co-defendant guilty.

The court told the jury:

> "There is no such thing as one conspiring. A person who alone plans and commits a criminal act is not guilty of conspiring." (R. 187)
>
> * * * * * * * *
>
> "You must find both defendants guilty or not guilty in this case, because you cannot find one guilty and the other not guilty." (R. 191)

The vice of the instruction is that while the court talks about guilt, he says nothing about proof. One may be guilty of conspiracy with the proof insufficient, but since we do not have the Scotch verdict of "not proven," the verdict must be not guilty. Here, the jury might have felt the proof sufficient to convict Mrs. Sangahid; although they might have felt that Blassingame equally

guilty, the proof was insufficient. Mrs. Songahid took the stand in her own defense; Blassingame exercised his privilege and remained silent. She might have convicted herself and they might have felt bound to return a verdict of guilty as to her. But under the instructions they had to find Blassingame equally guilty, or acquit both.

These instructions are not taken out of context; they are the only expressions by the court on the subject.

It seems to us the error is one involving fundamentals, the fact that our system of law is the adversary system. Under our system, a person might be guilty to a moral certainty, but if it could not be established by legal proof, there is no guilt in law. The principle was recognized repeatedly by the court when he said that certain evidence was admissible as to only one defendant—until and unless a conspiracy had been established. Now the jury might have felt that Mrs. Songahid did conspire with Blassingame, and the proof was sufficient; but that as to Blassingame the evidence admissible as to him did not establish that he conspired at all.

No exceptions were taken to the instructions and this calls for further comment. Rule 52(b) of the Federal Rules of Criminal Procedure, provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This is a case for the application of the Rule. See Judge Denman's dissenting opinion in *Bentar v. United States,* 209 F.(2d) 734, 743 (9 Cir.).

The court put the question to counsel whether there was any question in their minds whether the verdict

should find both defendants guilty or not guilty; only counsel for the Government answered, and his answer was that there was no question in his mind (St. 215).

It must be remembered that the defendant Songahid was seriously impeached. She had been shown to be a prostitute all her life, started according to the court when she was eleven, brought into prostitution violation of the Mann act when she was sixteen (St. 239), and the impression created upon the jury might have been most unfavorable; instead of pitying her as the court did, they might have felt that she was beyond redemption, and this coupled with her acknowledged narcotics addiction, demanded a guilty verdict. Under the court's instruction they were required to convict Blassingame also. This was a denial of trial by jury.

It is one thing to say that there could be no *conspiracy* without the active concurrence of two or more persons; that is an abstract principle of law with which no one would quarrel; it is quite another matter to say, where the proof is different, that proving the guilt of one establishes the guilt of another. In substance, that is what the judge said here.

It is true, no exceptions were taken to the instructions. But Rule 52(b), Federal Rules of Criminal Procedure, provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. And it is the rule in this Circuit that the court must instruct on all essential questions of law, whether or not it is requested to do so. *Samuel v. United States,* 169 F.(2d) 787, 792 (9th Cir.). In that case this Court said:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. * * * We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all."

The failure to except to instructions is not fatal to the appeal. In *United States v. Kelinson,* 205 F.(2d) 600, it was held that where the judge promises to give a charge to the jury that the admissions of a co-defendant were not binding on the defendant, after objections to the admission of testimony, failure to except to instructions is not a waiver.

The failure of the conspiracy charge would not prevent the filing of a proper Indictment. In the case of *In re Louie,* 218 Fed. 36 (9th Cir.), it was held that an acquittal on a charge of conspiracy is not a bar to a prosecution for aiding and abetting the commission of an offense against the United States.

CONCLUSION

For the reasons stated, the judgment should be reversed and the charge dismissed.

Respectfully submitted,

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